IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (LDG.) NO. 2858 OF 2005

Nitesh Ashok Wadhwani. ... Petitioner

Versus.

Union of India and thers. ... Respondents.

Dr.Virendra Tulzapurkar with Shri Virag Tulzapurkar, Shri Sandeep Shah and Shri H.J.Engineer i/by M/s.Gordhandas and Fozdar for the Petitioner.

Shri Y.S.Bhate with Shri N.D.Sharma for Respondents Nos.1 and 2.

Shri Ravi Kadam, Advocate General, with Shri Shyam Divan, Shri Vicky Singh i/by M/s.Mulla & Mulla C.B.C. for Respondent No.3.

CORAM : H.L.GOKHALE, &
ABHAY S. OKA, JJ.

DATED : 13th FEBRUARY, 2006.

P.C.:

1. Heard Dr.Tulzapurkar in support of this petition. Shri Kadam, Advocate General appears fr Respondent N.3 and Shri Bhate appears for Respondents Nos.1 and 2.

2. The Petition seeks to challenge the denovo hearing directed by Respondent No.2 Registrar of Trade Marks in the matter of registration of a trade mark "Manikchand" for a Pan Masala/gutkha for which an application has been made by Respondent No.3. The short facts leading to this petition are this-wise.

3. The Application made by Respondent No.3 for registration of his trade mark has been pending before

the concerned Assistant Registrar of Trade Marks for quite sometime. The Application came to be first rejected on 10th September 2003. Thereafter Respondent No.3 applied for a review and the review was allowed on 15th June 2004 and the application was revived and remanded to the Assistant Registrar. It is the case of the Petitioner that on 26th July 2004, the Petitioner came to know that this application has been rejected once again and he applied for a certified copy which is not being given. The Petitioner is another manufacturer of Pan Masala/Gutkha who is selling the same under the name "Malikchand". His application for registration of his trade mark is also pending. In the present petition prayer clause (c) seeks an order that the file concerning those proceedings concerning Respondent No.3 be deposited in this Court including the order dated 23rd July 2004.

4. A reply has been filed by the present Assistant Registrar of Trade Marks. In paragraph 11 of this reply, it is stated that the then Assistant Shri Ramjilal neither sealed nor dispatched the order dated 23rd July 2004. In his submission there was no orderpassed on 23rd July 2004 in the eyes of law. An Application/complaint was received from Respondent No.3 that he was not afforded a proper hearing. The complaint was also with respect to the conduct of the proceedings by Shri Ramjilal, then Assistant Registrar

who is stated to have passed this order on 23rd July 2004. The Registrar appointed a Committee of three members and the Committee recommended a fresh denovo hearing and that is how the hearing is being afforded to the Respodnent No.3. The same is being objected by the Petitioner.

4. Dr.Tulzapurkar, learned Counsel appearing for the Petitioner submitted that if there was any grievance with respect to the hearing concluded by Shri Ramjilal the proper course was that the application ought to have been placed before him which is the normal method and there was no occasion for a three member committee holding such an enquiry and directing a denovo hearing. In his submission an order of rejection was passed by Shri Ramjilal on 23rd July 2004. The order very much exists and in that view there is no occasion to hold a denovo enquiry. The submission of Dr.Tulzapurkar is that under section 18(4) of the Trade Marks Act 1999, if there is a refusal of the application made by a party for registration of its trade mark that is a decision in rem and any other party is entitled to apply for a certified copy under Rule 119 of the Trade Mark Rules 2002.

5. Shri Bhate, learned Counsel appearing for the Registrar on the other hand submitted that the entire manner in which Shri Ramjilal functioned on 23rd July

2004 is reflected in the file. The file has been produced which shows that on that day he made a noting that the order is reserved and thereafter he left for Delhi at about 4.00 p.m. The same file thereafter shows a hand written order giving reasons as to why the application was being rejected. The file shows that this order is scored out. Shri Bhate submits that the entire manner in which Shri Ramjilal has proceeded was suspicious and therefore, it was an administrative decision of the Respondents to withdraw the case from him and direct a de-novo hearing. That was permissible under section 4 of the Act.

6. Shri Kadam, learned Advocate General appearing for Respondent No.3 submitted that apart from this decision being an administrative decision, when the order is supposed to have been passed on 23rd July 2004 which was a Friday, the next two days offices were closed, and immediately on subsequent day i.e. 26th July 2004 the Petitioner had applied for a copy of the order concerned. A question arises as to how they came to know about the order which had not been forwarded even to the party concerned i.e. the Respondent No.3 under Rule 40. That apart, he submits that assuming that there is an error on the part of the Registrar in constituting the Committee and not sending the application/complaint to the Assistant Registrar Shri Ramjilal himself, basically the cause for the Petitioner

will arise only when a decision is taken to accept the application for registration of trade mark and advertisement is issued under section 20 of the Act. Thereafter the third party could have right to approach the Registrar and raise opposition to the registration under section 21 of the Act.

7. Shri Kadam relies upon the Judgment of the Apex Court in the case of M/s.Dhodha House v/s. S.K.Maingi, reported in 2005(10) SCALE page 267, wherein the Appellant had filed a suit against the Respondent for protection of his registered trade mark. That was in view of the advertisement of the registration of the application by the Respondent for registration of his trade mark which the Appellant found to be infringing his trade mark. In paragraph 32, the Apex Court in clear terms observed that a cause of action will arise only when a registered trade mark is used and not when an application is filed for registration of the trade mark. In a given case, an application for grant of registration certificate may or may not be allowed. The person in whose favour a registration certificate has already been granted indisputably will have an opportunity to oppose the same by filing an application. But the cause of action for filing the suit would not arise within the jurisdiction of the court only because an advertisement has been issued. That was in the context of a suit after advertisement of the

registration of the application. We are concerned with the application for registration supposed to be pending before the authority. The authority allegedly having decided the matter one way or the other, decided to reopen the decision. At that stage there is no notice to the third parties concerned to appear in the proceedings and to place whatever was their view.

8. Shri Kadam has drawn our attention to two Judgments of the Apex Court with respect to such erroneous orders if at all being passed by authorities concerned and as whether the Court should interfere in those orders by exercising jurisdiction under Article 226 of the Constitution. They are G.V.Rao v/s.Government of Andhra Pradesh, reported in AIR 1966 SC 828 and Mohammad Swalleh v/s.III Addl. District Judge, Meerut, AIR 1988 SC 94. In the latter case the Apex Court has held that technically the Appellant had a point regarding lack of jurisdiction of the District Court, but the order of the prescribed authority interfered by the District Court being itself bad, refusal of the High Court to exercise jurisdiction could not be faulted.

9. In the present case, it could be said that manner in which the matter was reopened was not fully satisfactory. But as far as the right of the Petitioner to challenge the order at this stage is concerned, we

will be guided by the view taken by the Apex Court in paragraph 32 of M/s.Dhodha House (supra). In the circumstances, we refuse to interfere with the decision taken by the Respondents. The petition is rejected.

10. We however make it clear that in the event the Application made by Respondent No.3 for registration is granted and the Petitioner is required to take appropriate proceedings at a later point of time, it will be open to the Petitioner to raise the objection that according to him the registration application was rejected on 23rd July 2004 and the matter ought not to have been opened. It will be for the authority concerned to decided on it.

11. Dr.Tulzapurkar states that the denovo hearing is kept on next Monday 20th February 2006. Dr.Tulzapurkar makes a request that the Assistant Registrar may not proceed with the denovo proceedings for a period of four weeks. Shri Kadam opposes the request. We, however, direct that the Assistant Registrar will not proceed further on the denovo proceeding for a period of four weeks.

(H.L.Gokhale, J.)

(Abhay S.Oka, J.)